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No. 87-1756

In The Supreme Court of the United States

October Term, 1987

DON SUNDQUIST,

Petitioner,

v.

WAYNE CHASTAIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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June 6, 1988

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QUESTION PRESENTED

Whether Petitioner, a Member of Congress, is immune from common law actions seeking money damages for defamation under the doctrine of official immunity where the actions taken by Petitioner were outside of his legislative responsibilities.

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OPINIONS BELOW

The opinion of the Court of Appeals (Petitioner's Appendix A) is reported at 833 F.2d. 311. The opinion of the District Court from which Petitioner's appeal flows is found at Petitioner's Appendix B and is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 6, 1987. A Suggestion for a Petition for Rehearing *en banc* was denied by the Court of Appeals on January 27, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

1. Respondent, Wayne Chastain, is a staff attorney employed by the Memphis Area Legal Services (MALS), which provides legal services to indigents in southwest Tennessee and is funded by the Legal Services Corporation. Petitioner, Don Sundquist, is a Member of Congress representing the 7th District of Tennessee. In contrast to the largely black, intercity clientele of MALS, Mr. Sundquist's suburban constituency in the Memphis suburbs is predominantly white and largely affluent. *Almanac of American Politics, 1986,* Barone and Ujifusa.

Since 1978, Respondent, as a MALS staff attorney, has fought a protracted legal battle with the Juvenile Court of Memphis and Shelby County and its elected chief judge, Kenneth Turner. This dispute revolves around the court's unjust collection of child support payments from indigent Memphis residents, often involving contempt proceedings and the imposition of jail sentences without affording indigents their constitutional rights to due process and assistance of counsel. Through civil actions pursued by Respondent in the federal courts, many of these rights

have now been secured. See *Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984).

On January 14, 1985, Petitioner, a close friend of Judge Turner, together with one of Judge Turner's court referees, State Senator Curtis Person, wrote a letter on his Congressional letterhead to then Attorney General William French Smith. See Petitioner's Appendix E. Subsequently, a copy of this letter was released to the Memphis media.

In his letter, Petitioner accused MALS of being involved "in the obstruction of the administration of the Child Support Enforcement laws" due no doubt in part to the recent legal victories obtained by Respondent. Petitioner continued by making a series of false allegations about Respondent, including a claim that he had been hired by MALS solely to harass Judge Turner, that Respondent worked in concert with two convicted felons and that Respondent was responsible for organizing street demonstrations against the Juvenile Court. Following release of the letter to the media, Petitioner further defamed Respondent at a civic luncheon in Memphis.

Following Petitioner's letter to the Attorney General, on February 27, 1985, Stephen S. Trott, then Assistant Attorney General, wrote to Respondent that he had reviewed Petitioner's allegations and concluded "that there is not sufficient evidence that federal criminal laws were violated to justify a federal investigation".

Respondent then sought, on two occasions, a retraction from the Petitioner. Failing that, on December 9, 1985, Respondent filed his Complaint in the Superior Court of the District of Columbia. (Petitioner's Appendix

D) Shortly thereafter, Petitioner removed the case to the United States District Court for the District of Columbia.

On April 9, 1986, the District Court, following briefing and oral argument, dismissed Respondent's Complaint, concluding that Petitioner was immune from suit under the doctrine of official immunity as enunciated by this Court in *Barr v. Mateo,* 360 U.S. 564 (1959). Respondent appealed.

Nineteen months later, a divided panel of the United States Court of Appeals for the District of Columbia Circuit, in a well reasoned opinion consistent with the precedents of this Court, reversed and remanded the District Court ruling below.

Circuit Judge Buckley, writing for the majority, found, based principally upon two prior decisions of this Court, *Doe v. McMillan,* 412 U.S. 306 (1973) and *Hutchinson v. Proxmire,* 443 U.S. 111 (1979), that there is no special immunity available to Members of Congress for suits in the nature of defamation other than the protection afforded by the Speech or Debate Clause. U.S. Const. art. 1, sec. 6, cl. 1.

The majority found this holding consistent with both historical and contemporary considerations of policy which have uniformly supported the theory of legislative exposure for common law defamation. The rationale for executive branch immunity rooted in *Barr* does not and should not apply to legislators, whose function is to make the laws, not enforce them, since no authority forces them to act. To the extent that Congress needs a measure of immunity, it was incorporated by the founding fathers

into the Constitution by virtue of the Speech or Debate Clause.

In conclusion, the majority found that:

> The Speech or Debate Clause provides members of Congress with an immunity that is coextensive with their legislative responsibilities. When they move beyond the requirements of their legislative responsibilities, they do so as volunteers, and at their own risk, however important their myriad activities may be in the texture of contemporary political life.

Judge Mikva dissented, finding that the actions of Petitioner fell within his official duties as a Member of Congress and, as such, should be immune so as to allow him to avoid the cost and inconvenience of defending against suits such as the one brought by Petitioner. However, as the majority most forcefully pointed out,

> public accountability is an essential feature of good government . . . the dissent would add a novel judicial protection without any evidence of its need, and do so at the risk of undermining the "good government" it so earnestly seeks. (Petitioner's Appendix at 29a-30a)

Following the panel decision, Petitioner filed a Suggestion for Rehearing *en banc* which was denied on January 27, 1988.

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ARGUMENT

The decision of the court of appeals below is consistent with the decisions of this Court, other circuit courts of appeals and with other decisions within the District of Columbia Circuit.

1. The decision below has not created, as Petitioner contends, a constitutional crisis between what it terms the "political" (legislative) and the "life tenured" (judicial) branches of government.[1]

Any conflict arising by virtue of the majority opinion is not between these two coordinate branches of government, but between Congress, which seeks authority to speak carelessly and with impunity, and its constituency, the people, who seek some measure of accountability and a check upon unprincipled legislators who would cause great harm to their names and their reputations without feeling the need to be truthful in their remarks.

Any suggestion that a "vital pillar" of the separation of powers will stand or fall based upon the decision below or that the legislative branch will be unable—or afraid—to govern is, quite frankly, ludicrous. To the contrary, one would have expected such a result, or more so, following this Court's decision in *Hutchinson v. Proxmire*, 443 U.S. 111 (1959), where Speech or Debate Clause protection for defamation actions was erased.[2]

2. While it is well established that official immunity, in one form or another, is generally available to executive branch officials, *Barr v. Mateo*, 360 U.S. 564 (1979) and has been held applicable in theory to legislative branch of-

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[1] If anything, Petitioner has created a separation of powers problem by his decision to point up House Resolution 446 and its concomitant "parade of horribles" in a Supplemental Brief which is clearly an attempt by the legislative branch to impose its will upon the judiciary.

[2] Petitioner makes much of the threat of impending litigation, yet offers no evidence that any such threat has or would materialize.

ficials, *Doe v. McMillan,* 412 U.S. 306 (1973), in no instance has this Court nor has any other court reported that the official immunity doctrine protects Members of Congress from common law defamation actions. To the contrary, this Court has, on two separate occasions, held just the opposite.

In *Doe,* supra, this Court stated, in an action brought against Members of Congress, their staffs, the Public Printer and the Superintendent of Documents, that:

> We conclude that, for the purposes of the judicially fashioned doctrine of immunity, the Public Printer and the Superintendent of Documents are no more free from suit in the case before us than would be a legislative aide who made copies of the materials at issue and distributed them to the public at the direction of his superiors . . . The scope of the inquiry becomes equivalent to the inquiry in the context of the Speech or Debate Clause, *and the answer is the same.* The business of Congress is to legislate; Congressmen and aides are absolutely immune when they are legislating. But when they act outside the "sphere of legitimate legislative activity" . . ., *they enjoy no special immunity* from local laws protecting the good name or the reputation of the ordinary citizen. (at 324) (emphasis added)

Read plainly, Petitioner is not entitled to relief under any theory of immunity, Constitutionally mandated or otherwise. The Court's holding in *Doe* was affirmed in *Hutchinson,* supra, where, quoting the prior decision, it was noted:

> A Member of Congress may not with impunity publish or libel from the speaker's stand in his home district . . . (at 130)

Respondent can reach no conclusion, other than that reached by the majority below, that Members of Congress are not immune from defamation actions.[3]

To reverse the majority below would completely undermine the rationale behind this Court's hold in *Hutchinson*, supra, which precluded any attempt to grant Congressmen a license to libel.

3. Any potential inconsistency created by denying official immunity to Members of Congress in defamation actions is resolved by either of two theories.

The first, and most logical, is that this Court has interpreted historical and public policy considerations as barring blanket protection from defamation actions. As the majority below points out,

> the historical record reveals an explicit, previously unquestioned rule of liability for a legislator's published libel on one hand, and immunity for executive officials . . . The accumulated wisdom accounting for this differentiation counsels against the grant of immunity sought by appellee. (Petitioner's Appendix at 22a).

Second, the founding fathers apparently recognized that some level of immunity for legislative actions was necessary to our governmental framework and they incorporated it into the Constitution. Executive immunity has developed along a separate track, and the two have crossed only rarely. To the extent immunity is available

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[3] Respondent recognizes that the Court's holding in *Hutchinson* was based solely upon the conclusion that the Speech or Debate Clause did not bar recovery. Nonetheless, Respondent concurs with the majority that there is no "blanket protection for libel suits". (Petitioner's Appendix at 13a)

for defamation, historically it was considered fair that legislative acts be protected by the Speech or Debate clause, or not at all.

4. As the majority below pointed out, the rationale for *Barr*, does not extend to legislators. Unlike the executive branch official who is obligated to enforce the laws enacted by Congress and to exercise enforcement discretion, the legislator has complete freedom in declaring the laws of our nation and control over their actions. The executive, on the other hand, lacks such control, and therefore the judicial doctrine of official immunity was developed.[4]

5. Petitioner argues the need to protect a Member's communication with his constituents as "one of our democracy's main channels of popular *accountability* and *responsiveness*" (Petitioner's Brief, at 13). (emphasis added). By the same token, a Member must act responsibly in making such communications and, just as he seeks to hold his constituent accountable, the constituent must be able to likewise hold the Member accountable.

One cannot imagine this concept being more important than at the height of a political contest, where spirits run high, tempers run short and where there is the tendency for candidates to make statements which "excite political passions." (Petitioner's Brief at 12) At the same time, there is often a tendency to ignore the accuracy of the

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[4] Petitioner urges the Court to adopt the "functional" test utilized in *Forrester v. White*, 484 U.S. — (1988) and find that the informing function of Congress requires a grant of official immunity. To the contrary, it is the abuse of that process, often in a purely political context, which is at issue here and for which no immunity should be allowed.

statements which are made, or to make them without proper investigation. By granting what Petitioner seeks, challengers for federal legislative office are placed at a distinct disadvantage since incumbents would be granted *carte blanche* to speak their mind without fear of being held accountable.

6. Contrary to Petitioner's claim that the decision below has turned Members into a cadre of "walking deep pockets" (Petitioner's Brief at 15), the real effect of the decision is that it puts them on an even par with everyone else, at least as to defamation. This result is not dissimilar from that reached recently in *United States v. Ford,* 830 F.2d 596 (6th Cir. 1987), where the panel reversed a "gag order" imposed by the District Court upon a Member under criminal indictment, concluding that "the representative be *as free* as his constituents" (at 601) (emphasis added) to speak his mind on issues of importance to him and to his freedom. By the same token, however, is the undeniable notion, supported by this Court's prior decisions in *Hutchinson,* supra and *Doe,* supra that a representative is not any freer than those that he represents. Petitioner should get no more and no less.

Nonetheless, *Ford* is clearly distinguishable from the instant case, except for the limited purpose alluded to above, since *Ford* involved a flagrant attempt by the judicial branch, through a *sua sponte* gag order, to stifle political communication while Respondent is merely seeking to pursue a civil remedy for damages already incurred.

Other cases cited by Petitioner, including, among others, *Hartley v. Fine,* 780 F.2d 1383 (8th Cir. 1985); *Morrison v. Jones,* 607 F.2d 1269 (9th Cir. 1979); *Kuzinich*

v. County of Santa Clara, 689 F.2d 1345 (9th Cir. 1982) and *Minton v. St. Bernard Parish School Board,* 803 F.2d 129 (5th Cir. 1986) are completely inapposite either because 1) they involve state or local legislators who do not already enjoy the benefits bestowed by the Speech or Debate Clause or 2) they do not involve issues of alleged defamation, which has obviously been the subject of separate consideration by this Court.

7. Finally, Petitioner complains of the "great menace inherent in inviting litigation against Members" and the " 'social costs' of such suits" (Petitioner's Brief at 15-16) and suggests that it is ample foundation to require immunity for Petitioner. While Respondent concedes in theory the propriety of this rationale as it extends to executive branch officials who, day in and day out, must enforce the laws enacted by Congress with often unpleasant consequences, no such heavy burden rests on Petitioner's shoulders. He has the freedom to act or not act as he so chooses.

At the other end of the scale is the potential menace and social costs inherent in giving a legislator too much freedom to speak his mind. As the majority below commented (Petitioner's Appendix at 27a):

> Among the many problems with this position is that of distinguishing between congressional activity undertaken to further a constituent's interests and that undertaken to further the member's interest in reelection. The line between the two can be as fine as the line that separates privilege and license; and it takes little imagination to see the ease with which, in the heat of political contest, an immunity from suit for common law libel becomes a license to libel.

This, rather than the arguments advanced by Petitioner, is the heart of the case presented herein to the Court.

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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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